NO. 83-538

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

NOVELTIES DISTRIBUTION CORPORATION and NEW JERSEY MANUFACTURERS INSURANCE COMPANY,

Employer/Carrier Petitioners,

v.

ANTHONY MOLEE and DIRECTOR, OFFICE OF WORKER'S COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Claimant and Federal Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF CLAIMANT RESPONDENT ANTHONY MOLEE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Statute Cited

33 U.S.C. § 901 *et seq.* (Longshoremen's and Harbor Workers' Compensation Act):

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Statement of the Case

Anthony Molee was working for Novelties Distribution Inc. as a "checker" or "location man" on August 11, 1978 at Berth 78, Elizabeth Port Authority Marine Terminal [31, 35, Ex. 1, 27].

Lumber in bundles were being discharged from the vessel EMMA JOHANNA at Berth 78 by "longshoremen" (Maher Terminals, Inc. employees, [70]) by lowering the bundles to the stringpiece by ship's gear.* Claimant testified:

> "Once it is on the stringpiece our fellas from Novelties would come with the lift trucks, pick it up and bring it to me, and I would be stationed somewhere in the middle, and I would tell them,—I would look at how many pieces to the lot, how many packages, and then I would determine where to put in on the berth."
>
> [24, 31]

The accident occurred as follows:

> "Well I was standing on the berth, on Berth 78, waiting for these machines, it was around 1:30 in the afternoon, and the reason I can tell you that is they said I was eating an orange, and the orange come out of my mouth, so we just got through eating, and I don't know what happened, all I know is I found myself on a stretcher, they tell me I had a tire mark on my back, and I had the papers in my hand, and I am looking at papers, waiting for the machines to come towards me, and they are coming towards me,

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* "Shift" on TR. p. 18, l. 3 [24] should read "ships" gear.

I am just waiting so I could figure where I'm going to put what, and the next thing you know, I was hit.

After all .when these tires go over you, you don't know what hit you."

[32]

Claimant Molee was struck down and run over by a hilo operated by Clarence Johnson, a Novelties employee who had been one of the 15 drivers taking lumber from the end of the ship's tackle on the stringpiece to the storage area on Berth 78. [32, 33]. The only activity carried on Berth 78 when a vessel was in was discharge of the vessel [48] and Novelties employees took possession of the lumber cargo when "it hits the stringpiece off the ship." [64].

Novelties does not operate a "lumber yard" at Elizabeth P.A. Marine Terminal. (Petitioner's Brief, pp. 4 et seq.). It operates the largest terminal on the East Coast for lumber, which is imported from the West Coast of Canada. No rail cargo is discharged at Berth 78 [63] where claimant Molee worked for 14 years.

Petitioner's disability was stipulated [16] and he is permanently and totally disabled.

Reason for Denying Writ of Certiorari

The Petition for Certiorari should be denied because it does not set forth any reason for granting certiorari. It is a restated brief on the merits, and as such is inappropriate, to say the least. There has been no attempt by the Petitioner to comply with the basic requirements of Supreme Court Rule 19. The facts are not disputed, and no novel or precedential issues are presented with respect to coverage under the Longshoremen's and Harbor Workers'

Compensation Act. Exsting case law amply covers the issue of jurisdiction as to the status of claimant as a maritime employee under sec. 2(3) of the Act, 33 U.S.C. sec. 902(3).

The effort by Petitioners to make a distinction as to claimant Molee's status under the Act is predicated on a record that is barren as respects support for the proposition that Novelties acts as "agents for the consignees." The Third Circuit Court of Appeals noted this discrepancy at Footnote 2:

> "The record on the question of agency is undeveloped. and the ALJ made no findings on this issue. The Board conclusorily stated that Novelties "acts as the agent of consignee." App. 91. Because we hold that Molee's claim falls within the Act, even if he is an agent of the consignees, we will express no view on the agency issue or on the stage at which the consignees obtain possession." (710 F2d 992, 994).

The findings and rulings of the Administrative Law Judge that the claimant Molee and the employer are within the coverage of the Longshoremen and Harbor Workers' Compensation Act were unanimously affirmed both by the Benefits Review Board and the Third Circuit Court of Appeals. There is nothing controversial or special about this case which would warrant recognition by the Supreme Court. The only remarkable thing about this case is the Petitioners' unwillingness to accept the result.

Claimant respondent Molee adopts and rests his case on the legal analyses and rulings of the Administrative Law Judge, the Benefits Review Board, and the Third Circuit Court of Appeals, all of which are set forth in the Appendix to the Petition.

CONCLUSION

There being no grounds stated why Writ of Certiorari should issue, the Petition should be denied.

Attorney's Fees

As an outgrowth of the ruling by the Benefits Review Board in *Mazzella* v. *United Terminals, Inc.*, 8-BRBS-755, reaffirmed on reconsideration 9-BRBS 191, and other cases such as *Owen* v. *Newport News Shipbuilding and Dry Dock Co.*, 11-BRBS-409, we are required to present a fee request to the Supreme Court, to be assessed against the Carrier/Employer for our legal services on behalf of claimant in opposing the Petition. In the event the Petition is denied, or in the event the decision below is affirmed after the granting of Certiorari, we are entitled to be paid as the Court directs and affirms.

Accordingly, we have appended to this Brief in Opposition our request for fees and reimbursement of expenses, and request that same be allowed under secs. 28 of the Act.

We must comment, however, that it is not in the best interests of the efficient administration of justice that the Supreme Court be bothered with attorney fee requests. Nor do we think that in LHWCA cases should the various Circuit Courts of Appeals, or the Benefits Review Board be burdened with separately evaluating, approving and fixing of attorneys' fees. Awarding an attorney fee is essentially a fact-finding process which is best suited to a trial court, which in this instance would be the Office of Administrative Law Judges. The appellate tribunals should declare policy, interpret the law, establish standards and review legal issues, and not be bothered with such ministerial matters. We therefore invite the Court to invoke its general

rule-making authority and direct that our fee request be remanded to the Office of Administrative Law Judges for appropriate action. We further invite the Court to declare that all issues and requests for Attorneys' fees under sec. 28 of the Longshoremen's Act be in first instance resolved *nisi prius* before the Office of Administrative Law Judges, subject to the appeal jurisdiction of the Benefits Review Board. Also, disputes regarding fees awarded by the Deputy Commissioner at the informal level, should be first reviewed by the Office of Administrative Law Judges, and not be required to be appealed direct to the Benefits Review Board as the present practice requires. (cf. *Hensley* v. *Washington Metropolitan Area Transit Authority*, 655 F. 2d 264, C.A.D.C., 1982)

Respectfully submitted,

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Of Counsel

APPENDIX A

Request for Claimant Respondent's Counsel Fee on Brief in Opposition to Petition for Certiorari.

½ hr. Receipt of Petition for Certification; review of Judgment of Affirmance Third Circiut Court of Appeals; letter to Clerk of Supreme Court inquiring as to date of filing of Petition to ascertain whether 90-day filing time limit was met. September 29, 1983.

6 hrs. Review of Petition, review decisions below, review of Supreme Court Procedures, preparation, drafting and concluding Brief in opposition. October 5, 1983.

1 hr. Review and proofreading of Brief in opposition. October 14, 1983.

Baker, Garber, Duffy & Baker respectfully requests that counsel fee of 1,125.00 for seven and one-half hour time at an hourly rate of $150.00 be awarded and assessed against employer/carrier. All services in this matter were performed by George J. Duffy and the rate previously charged by this office and allowed in this matter is $150.00 per hour. The present rate charged by our office is computing hourly charges in contingent compensation matters is now higher. Request is also made for assessment against the Carrier/Employer for reimbursement of printing charges Adams Press Corp. in the amount of $509.80.

MILTON GARBER
Attorney for Claimant-Respondent